IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1951

No. 114

WABASH CORPORATION and HARTFORD NATIONAL BANK & TRUST COMPANY (Trustee),

Petitioners,

v.

ROSS ELECTRIC CORPORATION and GENERAL ELECTRIC COMPANY,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A brief reply is made necessary by the inaccuracies and omissions of Respondents' Brief. We will refer to but a representative few to illustrate the untenable nature of Respondents' position.

1. The reference to "Plaintiff, Wabash [as] the flash lamp manufacturing subsidiary of Sylvania Electric Products", (Br. p. 2) is misleading because it is true only of the period since January 1946 (Pltfs. Exh. 1, Item HH). What is significant is that prior to 1946 the business of making and selling the patented photoflash lamps had been built up

from scratch to unprecedented size by a small company, which ventured its capital on the merit of that product and against entrenched competition. It was only after the Korver lamp had pushed the respondents' earlier foil filled Ostermeier lamp off the market (A 231) that Sylvania paid Korver the solid tribute of acquiring the company that held the exclusive license under his invention.

2. Respondents are in error in asserting (footnote, p. 2) that the Court of Appeals "did not pass on the defense of non-infringement". On the contrary the opinion of the court states (per A. N. Hand, A 216) that the "facts are fully set forth in the opinion of Judge Chase. I differ with him only in so far as he would hold the product patent valid." In Judge Chase's opinion there is specific approval of the finding by the District Court that (A 235):

> "In every particular referred to in the claims, the structure of the accused lamps is the same as or the substantial equivalent of that described and claimed in the Korver product patent."

Plainly the Court of Appeals passed on the defense of non-infringement and rejected it.

3. The attempt to belittle the product patent as "a patent solicitor's invention" (Br. p. 4) is exactly contrary to fact. Claims for the product, the photoflash lamp, were included in the original application (Defts' Exh. GG, page 11). They were transferred to the divisional application only in response to the Examiner's requirement, in which he pointed out that the claims for the flash lamp were for a different invention from those for the means or method of filling it (id. p. 16).

4. In its argument on the merits, respondents' first reliance is on the commercially discarded Ostermeier foil filled lamp (p. 5). It is too late to argue that respondents have followed Ostermeier rather than Korver for the adjudication of both courts below has been to the contrary.

Its second reliance is on assertions of non-infringement (p. 6), which were unanimously rejected by the judges below.*

Respondents' third and main reliance is on vanLiempt, to whom respondents would attribute the first invention of wire fine enough for use in a flash lamp (Br. p. 9). But Shedlock had shown how to cut fine wire from thin sheets, just as respondents cut theirs, in his patent No. 888,124 of 1908 (Defts'. Exh. H, Tab 6). His filaments were of the same order of fineness as respondents (id, p. 1, ls. 72-84). Numerous patents and publications in the thirty years before vanLiempt spoke of using wire or ribbon for the filling of flash lamps (A 23, 31, and see statement in respondents' Ostermeier patent—Exh. Bk. p. 12, ls. 3-5). It was not fine wire the art was waiting for but the conception of uniformly distributing it throughout the entire bulb space in turns and loops supported elastically by the glass walls of the bulb itself. Before this unorthodox

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* Still laboring the argument that the filling in the accused lamps is not "elastically supported", respondents refer to the photographs at pages 52 and 53 of the Exhibit Book (Br. pp. 6-7). The photographs afford no fair comparison, for the Wabash lamp shown on page 53 had internal lacquer to which the loops of wire were bound to adhere as the jagged top of the lamp bulb was removed, while the G. E. lamp shown on page 52 was especially made without any inside lacquer (A 136). When the fillings were removed from standard commercial Wabash and G. E. lamps of corresponding size they were shown by *respondents'* expert to occupy the same overall space (A 175-6), contrary to these photographs. The elasticity of respondents' filling material, and its undulated, serpentine course, are clearly shown in Pltfs'. Exh. 38 (Exh. Bk. p. 27). All of the judges below agreed that in respondents' flash-lamps:

> "The mass of shreds is so light (generally less than a tenth of a gram) that the loops and tips in contact with the glass wall of the bulb are adequate to support the filling elastically and hold it in place, just as taught in the Korver patents." (A 235)

concept, which completely changed the practices of this industry, the bulb filling was supported by the ignition stem and was kept away from the bulb wall to avoid breakage on ignition. VanLiempt showed the very opposite of Korver's conception, as evidenced by his patent drawings and his warning against allowing the wire to touch the bulb walls (referred to at p. 9 of Respondents' brief). Instead of keeping his wire away from the bulb wall, Korver deliberately pressed it against the wall at countless tiny points, to obtain elastic support without danger of overheating or cracking the glass. The District Judge correctly held that vanLiempt "offers nothing in respect to the distribution of the content nor of the elastic support defined in the Korver claims" (A 21) and that his "filling material was neither serpentine, nor undulating" (A 36),—all of which was fully confirmed by Judge Chase (A 231-2). On top of that, indeed, by reason of that, the vanLiempt "lamp had poor lighting characteristics and was rejected commercially" (A 36). Respondents' assertion that it was van Liempt, not Korver, who solved the problem is in the teeth of the established facts.

Certainly neither the Nichols nor the Kobayashi patent (Br. p. 10) aided in the solution. So respondents are thrown back on Crowley (pp. 10-11) as was Judge A. N. Hand (A 216). If ever there was a case in which the very vagueness of a prior patent was utilized to destroy a later patent for an immensely successful invention, this is it. The Crowley patents are palpably and deliberately vague as to filling material because they have nothing to do with that; they are wholly concerned with the form and operation of the igniter and means to permit escape of the reaction gases.* They teach nothing as to the filling that was not long since known to the impotent art. As stated by Judge

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* Being foreign patents, they are not even clothed with the presumption of operativeness attributable to American prior art patents.

Chase (A 232) they mention metallic wool, among other filling materials, but come no closer to showing the Korver lamp. The absence of any disclosure as to the support or distribution of the filling is a fatal defect in Crowley, not a merit as respondents would have it.

It is beyond dispute that Korver was the first to bring together the elements of the claims in suit. It was his combination, not Ostermeier's, nor vanLiempt's, nor Crowley's, that revolutionized the art and made the foil lamp obsolete.

If the patent law is to be administered to promote the progress of the useful arts, this is a case that plainly merits review. Contrary to Respondents' conclusion (Br. p. 2), this case *does* present a question of general interest and great public importance.

Respectfully submitted,

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Dated: July 19, 1951.